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ABSTRACT

This social studies unit considers the nature and sources of the individual rights of American citizenship as well as the complexity of the federal system as it operates on the liberties of the individual and relates to state government. The unit is structured chronologically to indicate that the history of liberty is largely the history of legal procedures. It notes changes in the understanding of individual rights from early manifestations in England, through the 18th century American contributions in the Bill of Rights, to the Fourteenth Amendment. To further illuminate how legal processes affect the acquisition of human liberties, the 1963 "Gideon v. Wainwright" decision and the right to counsel are discussed. The right to trial by jury in federal court, the use of evidence without a warrant, and extensions of the right to counsel are then considered as examples of the part that the Supreme Court has played since the Twenties in the reaffirmation of civil liberties. Included are excerpts from relevant Supreme Court decisions, such as "Escobedo v. Illinois" and "Palko v. Connecticut." /Not available in hard copy due to marginal legibility of original document.7 (Author/JB)

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EXPERIMENTAL MATERIAL
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TEACHER'S MANUAL

LIBERTY AND LAW:
THE NATURE OF INDIVIDUAL RIGHTS

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This material has been produced
by the
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NOTE TO THE PUBLIC DOMAIN EDITION

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This unit was initially prepared in the summer of 1965

The subject of this unit is the nature of individual rights and it is hoped that the readings which have been included in the unit will provide insight into at least three separate, but intricately related, aspects of the problem.

First, the unit raises questions regarding the relationship of individuals to government: What is the source of the rights of individuals? And how are they protected? Do individual liberties belong to a person simply by virtue of his being human? That is, are there some rights which are "natural" rights and which are, therefore, absolute? Or, are all "rights" merely privileges which one enjoys at the discretion of the sovereign?

Secondly, the unit should reveal something of the historical development of individual rights in the United States. It should be clear to the reader when he has finished that the matter of securing particular individual rights in American history has not been simply a matter of rehtorical expression. It has been rather a slow step-by-step process of placing specific limitations upon particular governments or legal jurisdictions.

Finally, the unit is designed to indicate some of the ambiguities inherent in a federal system government. Accordingly, certain questions ought to arise throughout the unit: If the right to trial by jury is a fundamental right, should it not be protected in all jurisdictions, state or federal? Or, does a small, local government have some intrinsic virtue, absent in a large and distant government, which naturally allows it more discretion in matters of individual liberties?

In considering the best way to use the unit, it might be helpful to keep in mind that many of the readings are complex and difficult, requiring careful reading and analysis for clear understanding. The selections in Section III, in particular the Slaughterhouse Cases, and Palko v. Connecticut contain intricate arguments on the constitutional relationship of the states to the federal government as well as on the relationship of the individual to both state and federal government. For this reason, it does not appear wise to suggest any particular number of days in which to finish the unit, although somewhere in the neighborhood of two weeks should suffice. One way of approaching the unit has been outlined below, but a teacher may find it better to spend more or less time on any given section, depending upon the ease with which his students grasp the essential ideas involved.

A word about the sources used in the unit might be of benefit. As you will see, most of the documents included relate to criminal procedure, the rights enumerated in Amendments Iv-VIII of the Constitution. More specifically, the right to trial by jury, the right to security against unreasonable searches and seizures, and the right to counsel are considered at length. This selection has been deliberate. Readings concerning the right to counsel have been used because recent Supreme Court decisions, culminating in Gideon v. Wainwright and Escobedo v. Illinois, are excellent examples of the ambiguity, or double standard, regarding individual rights which still exists in the United States. The rights to jury trial and to security from unreasonable searches and seizures have been used not only for this reason, but also because they are two specific rights which were at issue in the American Revolution. They, therefore, furnish a good comparison between eighteenth century rhetoric and twentieth century practice. The students should be aware, however, that the other rights found in the first ten amendments have had histories similar to those of the rights being studied.

In order to get the student to think about the problem, a short paper might be assigned before he has read any of the unit. If he is made to commit himself in the beginning by answering such questions as "What is a right?", What are the rights of American citizenship?", "Where do they come from?", and "How are they protected?", he will have some basis from which to begin his study.

The introduction to the unit and Section I should, if possible, be read in one sitting. The purpose of this section is to see that as late as 1963, and contrary to popular belief, there was still disagreement over who has a right to counsel under the Sixth Amendment and when that right begins. If the student obtains a healthy confusion as to what the Sixth Amendment means and an indication from the Betts case of the extent to which the amendment guaranteed the right to a lawyer, then he should be ready to move on to Section II.

Section II can be divided easily into either two or three assignments. The section as a whole is intended to reveal the historical sources of American liberties and open the question of the theoretical source.

The question of the source of rights is at the heart of this unit. Inasmuch as the selections in Part A are designed to be used to open the consideration of natural rights versus positive rights, this is a good place to call the student's attention to the fundamental nature of the question. After raising the central theoretical considerations in Part A, Part B provides some examples of the type of arbitrary governmental action that Americans of the eighteenth century hoped to avoid. Part C introduces the student to the character of American revolutionary rhetoric.

Part A, which consists of two contradictory statements about the source of rights, whould probably be used by itself as the basis for one day's discussion.

The documents in Part B can do a number of things: 1) They can show something about the way in which rights are acquired by indicating that over a period of many years the king's power was gradually reduced; 2) They can raise the question as to whether or not it makes any difference to the individual if he is jailed arbitrarily by the king or by Parliament, or in modern terms by the federal government or by the state; 3) They can, through the implications of their omissions, tell the student much about the differences between early English practice and later American practice, especially as he reviews the problem in the subsequent sections of the unit.

Moving to Part C, more specific questions can be asked: According to Americans, what were the most important rights denied them by the English? Was the denial of those rights sufficient cause for a revolution? What did Americans claim as the source of their rights?

As with Section I, it would probably be best to read Section III all at once. Since the section contains a definite debate on the merits of a bill of rights, it could be an opportunity to divide the class in order to argue the point. The subtle significance of the section may not be readily apparent to everyone. Somewhere along the way it should be made clear that the section raises questions regarding the uncertainty of sovereignty in a federal system of government and that, by leaving the states the power to determine the extent to which individual rights would be protected in their respective jurisdictions, the Constitution cast doubt upon the natural rights position. At the very least, the students should realize from the readings that, as a matter of historical fact, it was the new federal government, not the states, which the framers feared and against which the Bill of Rights was aimed. Those who are really sharp will also see that the very fact that the question of the need for a specific bill of rights is debatable implies something about the nature of the rights being discussed. Part B gives the student a decision of the Supreme Court defining the purpose and extent of the Bill of Rights in 1833.

Section IV can be studied as a single assignment, or it can be divided. Part A ought to disclose that the purpose of the Fourteenth Amendment was to place individual rights under national as opposed to state jurisdiction that it was to overrule Barron v. Baltimore. Part B reveals that, despite the intentions of the framers of the amendment, the Supreme Court interpreted the amendment in a way which left individual rights in the hands of the states. It should be clearly seen by this time that two standards are being applied, that the federal government must proceed strictly according to the Bill of Rights while the states make their own rules.

With the purpose of the Fourteenth Amendment clearly in mind, this might be a good place for a review of the progress made since the thirteenth century. For this reason, clauses from Magna Carta, the Fifth Amendment, and the Fourteenth Amendment have been juxtaposed to show how men in different periods have placed similar limitations upon different legal jurisdictions.

Bingham's speech also offers a chance for some review. What does he mean when he contends that the states have never had the right to deny life, liberty or property without due process of law? Is this correct historically?

In coming to grips with the argument in the Slaughterhouse

Cases, a careful examination of the text of section one of the Fourteenth Amendment is essential: What is the significance of the Court's distinction between state citizenship and United States citizenship? Do you suppose Bingham and the other framers of the amendment intended such a distinction? Should it make any difference what they intended, or should the amendment be interpreted without regard to the intention of the framers? What effect might the Slaughterhouse Cases have on the protection of civil rights and civil liberties in the United States?

Section V is long and involves a number of distinct ideas. With this in mind, a good opening assignment might be Documents 1 and 2. By reading these two selections the student can compare two opposite positions on the Bill of Rights taken recently by Supreme Court Justices. Questions asked of the students can be simple: How do Justices Cardozo and Black compare on individual liberties and the Bill of Rights? How does each of them compare with those who expressed themselves on the subject in the eighteenth century? According to each, what is the function of a specific bill of rights? Which of the Justices is taking a natural rights position? As with Section III, a class debate on the subject might be instructive.

After reading Cardozo and Black, the rest of Part A can be studied to see something of the recent development of the Supreme Court's thinking on individual rights. The cases included in this section show that neither the Constitution nor the Bill of Rights nor the Fourteenth Amendment closed the question of civil liberties. The statement by Justice Murphy in Glasser v. United States explains that the right to a jury trial is considered fundamental in federal courts; then Documents 4 through 6 disclose that this is not considered a fundamental right in state courts unless so considered by the respective state constitutions. The Mapp case reveals that the old problem of writs of assistance is still with us, and it re-examines the merits of using evidence obtained without a warrant in criminal proceedings. The Gideon and Escobedo cases point out some of the implications of extending the right of counsel to those accused of crimes in state courts.

Some questions about Part A might be: What might John Adams have thought of Snyder v. Massachusetts? What might James Otis have thought of Mapp v. Ohio? What are the implications of the Mapp case as far as the police are concerned? What is the difference between the Gideon and the Escobedo cases? What are some likely results of Escobedo?

Finally, Part B of Section V should be read to open up the debate as to the impact upon an orderly society of absolute protection for the accused in criminal procedures. The differences of opinion are clear and, once again a class debate is a possibility.

A final short paper would help the student collect his thoughts. He could be asked to answer the same questions he answered in the paper he wrote before beginning the unit. Hopefully, the answers will not be identical.

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EXPERIMENTAL MATERIAL
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STUDENT'S MANUAL

LIBERTY AND LAW:

THE NATURE OF INDIVIDUAL RIGHTS

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INTRODUCTION

Individuals establish governments in order to have rules, or laws, to live by and it is in the interests of a society as a whole to see that the persons living in that society obey the laws. It is in the nature of things, however, that some individuals will from time to time come into conflict with the laws of their government. When this happens, a government undertakes to apprehend and punish the lawbreaker. This apprehension and punishment can be done, essentially, in one of two ways: the government can proceed in a manner which is designed to respect the lives and liberty of its citizens, making certain that the rights of the people involved, innocent or guilty, are not violated; or it can run roughshod over the privacy, liberty, and lives of those who are suspected of breaking the law, and perhaps, too, of some who are completely innocent.

The history of liberty has largely been the history of peoples who have worked at seeing that the first of these alternatives is the practice of their governments; in the words of Felix Frankfurter, it has been "to a large extent the history of procedural observances."[1] In the United States, for example, the Bill of Rights demands that no person shall "be deprived of life, liberty, or property, without due process of law." Realizing that a sovereign state by definition has ultimate authority and overwhelming power, democratic peoples have thought it necessary to limit the use of that power by erecting certain procedural safeguards, rules of fair play so to speak, in order to balance the individual's ability to prove his innocence against the state's ability to prove his guilt. These safeguards are necessary because governments can oppress individuals and groups as well as protect them. The laws of a government are intended to protect the society and the individuals in it from robbers, murderers, and other such undesirable persons; the legal procedures by which the government must proceed against the accused are intended to protect the rights of the individual from the misuse of power by the government.

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[1] Felix Frankfurter, The Public and Its Government (Yale University Press, New Haven, 1930), 60.

But the simple declaration of the right to due process of law, of the necessity of the government's observation of certain procedures, does not end the matter. As a matter of fact, the really tough work in the United States followed the ratification of the Bill of Rights. From 1791 to the present, politicians, historians, lawyers, and particularly the Supreme Court have been trying to decide exactly what the Bill of Rights means and just what "due process of law" entails. Does "due process" consist simply of a few formalities, elaborate procedures which a court must go through before lowering the boom on a suspect? Or does it consist of certain fundamental rights, natural rights if you will, which no government may abridge regardless of procedure? In other words, are there some things to which an individual has an absolute right which no government, state or local or federal, may limit? If so, what are they? If, however, there are no such rights, then what is the source of our rights and liberties? Are they simply privileges which a government may or may not allow us to enjoy?

In the documents which follow, you will see how a number of Americans have answered these questions. You will want above all to read the documents with care. Some of them are quite difficult, involving complex arguments about the relationship of the individual to government as well as the relationship of two governments or legal jurisdictions to each other. Though difficult, these documents are also logical, and, if you are willing to think about them logically they are clearly understandable. What is more, inasmuch as they deal directly with the question of the rights of individuals, they are entirely relevant to every generation of American citizens.

The primary structure of the unit is chronological. You will want to watch for any significant changes or substantial consistencies in the theory and practice of individual rights as you follow the problem from its earlier manifestations in England, through the eighteenth century American contributions in the Bill of Rights, to the ambiguities of the debate since the Civil War and the Fourteenth Amendment.

The basic rights of Americans are enumerated in the Bill of Rights, which can be found in the appendix of the unit. You should become familiar with this document, as you will want to refer to it from time to time throughout your study of individual rights.

SECTION I

CLARENCE EARL GIDEON:

A LOOK AT THE RIGHT TO COUNSEL IN 1963

The question of what constitutes a fair trial in America was settled, as far as the rhetoric of the matter is concerned, with the adoption of the Constitution and the Bill of Rights in the eighteenth century. A fair trial would be obtained whenever none of the rights listed in the Constitution or the Bill of Rights was violated. This is fine in theory, but the matter of guaranteeing specific rights in practice has proved to be a much more difficult thing to secure, especially since it has been complicated by the ambiguities of our federal system of government. The Bill of Rights may say, as it does, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence;" but having said this, there is still the problem of interpreting what it means.

Unfortunately for students of American history, the history of constitutional interpretation concerning individual rights is far from one of blessed unanimity, as the selections of readings in this section will reveal. The documents in this section are concerned with the right to counsel, but the following debate over the nature of the right to counsel can be matched by equally lengthy debates over the nature of the right to trial by jury, the right to be secure against unreasonable searches and seizures, and almost all of the other guarantees of the first ten amendments. If, therefore, you can keep in mind that the issue of the right to counsel is only one right over which there has been disagreement, then you can begin to see how complicated the picture of individual liberties in America has been.

1. Clarence Earl Gideon was tried in a Florida court in 1961 for breaking and entering a poolroom. The transcript of his trial begins as follows:[1]

> [This selection is essentially a dialogue between "The Court" and Mr. Gideon, in which it is established that Gideon does not have legal counsel for the trial. He requests the Court to appoint counsel to represent him in the trial and claims that the United States Supreme Court has established his right to counsel. The Court refuses to appoint counsel on the basis of a Florida law that does not allow such appointments unless the defendent is charged with a capital offense.]

2. After his conviction Gideon appealed to the Supreme Court on the grounds that he had been denied a lawyer at his trial and that, since he was too poor to retain one himself, the court should have appointed one for him. The Supreme Court agreed to hear his case and appointed Abe Fortas to represent Gideon. On November 13, 1962, Fortas received a letter from Gideon, telling his side of the story. The spelling and punctuation are Gideon's:[2]

> [Gideon describes the incident which led to his arrest and conviction on a charge of breaking and entering. He claims that he did not commit a crime and did not receive a fair trial. He contends that an attorney would have "brought out" those factors that would have proved his innocence but that he was not able to obtain an attorney.]

3. Gideon had said that "the United States Supreme Court says I am entitled to be represented by counsel." What the Supreme Court really said is to be found in the case of Betts v. Brady in 1942, a case in which the facts are strikingly similar to those of Gideon's case.

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[1] Quoted in Anthony Lewis, Gideon's Trumpet (Random House, New York, 1964), 9-10.

[2] Quoted in ibid., 75-76.

Justice Owen J. Roberts wrote the opinion for the majority:[3]

> 3. Was the petitioner's [Betts] conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?
>
> The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment. . . . Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. . . . Asserted denial [of due process of law] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed. . . .
>
> The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness? The answer to the question may be found in the common understanding of those who have lived under the Anglo-American system of law. By the Sixth Amendment the people ordained that, in all criminal prosecutions, the accused should "enjoy the right . . . to have the assistance of counsel for his defence." We have construed the provision to require appointment of counsel [in federal courts] in all cases where a defendant is unable to procure the services of an attorney, and where the right has not been intentionally and competently waived. Though, as we have noted, the Amendment lays down no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment. . . .
>
> . . . [I]n the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems

---

[3] 316 U. S. 455, 461-62, 464-65, 471-73 (1942). (Footnotes omitted)

> proper, to appoint counsel where that course seems to be required in the interest of fairness. . . .
>
> In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. . . .
>
> As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.
>
> The judgment is
>
> Affirmed.

4. Although the majority opinion is, of course, the one that carries the day on the Supreme Court, any Justice who disagrees with the majority may put his views on record in a dissenting opinion. In Betts v. Brady, Justices Black, Douglas, and Murphy dissented. Here is part of Justice Black's opinion:[4]

> . . . The petitioner [Betts] a farm hand, out of a job and on relief, was indicted in a Maryland state court on a charge of robbery. He was too poor to hire a lawyer. He so informed the court and requested that counsel be appointed to defend him. His request was denied. Put to trial without a lawyer, he conducted his own defense, was found guilty, and was sentenced to eight years' imprisonment. The court below found that the petitioner had "at least an ordinary amount of intelligence." It is clear from his examination of witnesses that he was a man of little education.

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[4] 316 U. S. 455, 474-477 (footnotes omitted).

If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government. I believe that the Fourteenth Amendment made the Sixth applicable to the states. But this view, although often urged in dissents, has never been accepted by a majority of this Court and is not accepted today. . . .

This Court has just declared that due process of law is denied if a trial is conducted in such manner that it is "shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness and right."

. . . A practice cannot be reconciled with "common and fundamental ideas of fairness and right," which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel had made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. No one questions that due process requires a hearing before conviction and sentence for the serious crime of robbery. As the Supreme Court of Wisconsin said, in 1859, ". . . would it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial of the matters with which he was charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him. . . .Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?"

Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the "universal sense of justice" throughout this country. In 1854, for example, the Supreme Court of Indiana said: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defence of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court and to the public." And most of the other States have shown their agreement by constitutional provisions, statutes, or established practice judicially approved, which assure that no man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.

SECTION II

THE SOURCE OF RIGHTS

By now you should be thoroughly confused. Perhaps you have begun to ask yourself how we have managed, since the Constitution was written so long ago, to keep things so completely muddled. If equal justice for all is largely what our history has been about, why have we not decided by now whether a person has a right to counsel or not? Judging from the opinions of the Betts case, it may appear to you that the basic question the Supreme Court deals with is: "When is a right not a right?"

The problem of the rights of American citizens is complex, and the questions it raises are not answered without some effort. But some answers should begin to emerge if one goes back for a look at some of the history of individual rights and liberties in America.

The readings in this section are illustrative of the feelings concerning individual rights at the time of the American Revolution. The section is divided into three parts: the first raises the issue of the source of rights, the second deals with the English attitude toward individual rights before the Revolution, and the third with the reasons for revolution in America. It will be good to keep in mind that although England provided the basis of our own constitutional experience (the colonists, you will remember, claimed the liberties of free Englishmen during the Revolution), it also provided the basis for revolution by denying some of those liberties to Americans. You will want to decide why this denial was particularly repugnant to the colonists, and you will want to determine what the Americans considered the source of their rights to be.

In reading any document enumerating certain rights, it is always important to examine carefully the language of the document in order to distinguish between rights that are guaranteed or protected and privileges that are granted.

A. The Issue Raised

1. In 1795 Thomas Paine made some remarks concerning the source of individual rights:[1]

> . . . A declaration of rights is not a creation of them, nor a donation of them. It is a manifest of the principle by which they exist, followed by a detail of what the rights are; for every civil right has a natural right for its foundation, and it includes the principle of a reciprocal guarantee of those rights from man to man. As, therefore, it is impossible to discover any origin of rights otherwise than in the origin of man, it consequently follows, that rights appertain to man in right of his existence only, and must therefore be equal to every man. . . .

2. A modern civil rights organizer expresses his opinion on the same subject:[2]

> [Saul Alinsky claims that people have to take "opportunity or freedom or equality or dignity" through their own efforts rather than to expect them to be given as gifts.]

B. The English Background

1. On June 15, 1215, a number of English barons demanded that King John guarantee certain rights. Some of the rights listed in the Magna

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[1] Moncure D. Conway, ed., The Writings of Thomas Paine (G. P. Putnam's Sons, New York, 1895), III, 271.

[2] Saul Alinsky, "A Professional Radical Moves In on Rochester," Harper's Magazine, CCXXXI (July, 1965), 54.

Carta that followed were that:[3]

> 38. No bailiff for the future shall place any one to his law on his simple affirmation, without credible witnesses brought for this purpose.
>
> 39. No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.
>
> 40. To no one will we sell, to no one will we deny, or delay right or justice.

2. Some four hundred years later, however, James I developed money problems:[4]

> /James's conflicts with Parliament between 1604 and 1621 are discussed. James dissolved Parliament in 1614 and sent four members to the Tower, since Parliament refused to give the King a money grant until he discussed its grievances. James then collected money by forcing the wealthy to "contribute" and "loan" money to the government, and sent at least one man to the Tower for refusing./

3. James's son, Charles I, continued the family tradition:[5]

> /This selection indicates that when Parliament met in 1629 there was still a conflict with Charles over his taxation policies without Parliamentary consent. Charles seized the goods of one member of the House of Commons, and the Court of Star Chamber ordered a man's ear cut off for their refusal to pay the King's duties./

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[3] Edward P. Cheyney, ed., "English Constitutional Documents," Translations and Reprints from the Original Sources of European History (University of Pennsylvania, Philadelphia, 1897), I, No. 6, 12.

[4] Walter Phelps Hall and Robert G. Albion, A History of England and the British Empire (Ginn and Company, New York, 1937), 317. ("Reprinted through the courtesy of Blaisdell Publishing Co., a division of Ginn & Co.")

[5] Ibid., 328.

4. A modern writer describes royal court procedure:[6]

> [This selection indicates that not until 1836 was a defendent given an unqualified right to counsel. The rules in Queen Elizabeth's reign which restricted the rights of the accused are then listed.]

5. An example of punishment given by the King's Council, of which the Court of Star Chamber was a branch:[7]

> [This selection describes the physical tortures and life imprisonment a Dr. Leighton received for his libelous comments against the church.]

6. In response to the arbitrary actions of James I and Charles I, Parliament began to act. In June, 1628, Parliament prepared the famous Petition of Right:[8]

> To the King's most excellent majesty.
>
> Hymbly shew unto our sovereign lord the King, the lords spiritual and temporal, and commons in parliament assembled, That whereas . . . by which the statutes before mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom [from taxation without consent of the freemen of the realm], That they should not be compelled to contribute to any tax, tallage, aid or other like charge not set by common consent in parliament.
>
> Yet nevertheless, of late divers commissions . . . your people have been . . . required to lend certain sums of money unto your Majesty, and many of them, upon their refusal so to do, . . . have been constrained to become bound to make appearance and give attendance before your Privy Council and in other places, and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted: and divers other charges have been laid and levied upon your people . . . against the laws and free customs of the realm:
>
> And where also by the statute called "The Great Charter of the Liberties of England," it is declared and enacted, That no freeman may

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[6] Richard L. Perry, ed., Sources of our Liberties (American Bar Association, Chicago, 1959), 252. (Footnotes omitted).

[7] *Ibid*., 131n.

[8] Samuel R. Gardiner, ed., The Constitutional Documents of the Puritan Revolution, 1625-1660 (Clarendon Press, Oxford, 1899), 66-68. (Footnotes omitted)

be taken or imprisoned . . . , or be outlawed or exiled; or in manner destroyed, but by the lawful judgment of his peers, or by the law of the land . . . :

Nevertheless against the tenor of the said statutes . . . divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your Justices by your Majesty's writs of Habeas Corpus, there to undergo and receive as the Court should order, and their keepers commanded to certify the causes of their detainer; no cause was certified, but that they were detained by your Majesty's special command , . . . and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law . . . :

They do therefore humbly pray your Most Excellent Majesty, That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament . . . ; and that no freeman, in any such manner as is beforementioned, be imprisoned or detained. . . .

7. But if it felt it was necessary, Parliament, too, was capable of punishing persons in an arbitrary manner:[9]

> /This excerpt is a description of the protest against the English legal system of a John Lilburne, who was charged with crimes for his religious and political activities. After several prosecutions and punishments without a jury trial, he was banished from England by an Act of Parliament. He returned to England insisting that the banishment was a denial of "due process of law" which he claimed was guaranteed by the Magna Carta and 1628 Petition of Right. He also claimed many rights heretofor not granted to the individual. Although he did receive a jury trial and was acquitted, the jury itself was "severely punished by the Court."/

8. Finally, following a Civil War and more arbitrary actions by Stuart kings, the English articulated their feelings in the Bill of Rights of 1689:[10]

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[9] Hugo L. Black, "The Bill of Rights." As quoted in Irving Dilliard, One Man's Stand for Freedom (Alfred A. Knopf, New York, 1963), 34-35.

[10] English Constitutional Documents, 32-34.

An act for declaring the rights and liberties of the subject, and settling the succession of the crown.

. . . whereas the late King James II, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom:

8. By prosecutions in the Court of King's bench, for matters and causes cognizable only in Parliament; and by divers other arbitrary and illegal courses. . . .

10. And [whereas] excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons, upon whom the same were to be levied. . . .

And thereupon the said Lords Spiritual and Temporal, and Commons . . . to in the first place . . . for the vindicating and asserting their ancient rights and liberties, declare . . . :

I. 1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal. . . .

4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal. . . .

9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. . . .

C. The Revolution: The Argument Over Arbitrary Action in the Colonies

1. During the early part of the eighteenth century, most British subjects, both Englishmen and Americans, were fairly well satisfied with their liberties as defined in Magna Carta, acts of Parliament, and the Bill of Rights of 1689. A crisis developed, however, when Parliament aimed a couple of revenue acts at the colonies which were to be enforced through methods which the colonists felt to be unconstitutional. The most important of these acts was the Stamp Act of 1765, which levied a tax on most businesses involving legal documents or papers, on pamphlets, playing cards, advertisements, and sundry other written or printed articles. A portion of the act which deals with the enforcement of violators, reads as follows:[11]

> . ... Offences committed against any other Act or Acts of Parliament relating to the Trade or Revenues of the said Colonies or Plantations; shall and may be prosecuted, sued for, and recovered, in any Court of Record, or in any Court of Admiralty,[12] in the respective Colony or Plantation where the Offence shall be committed, or in any Court of Vice Admiralty appointed or to be appointed, and which shall have Jurisdiction within such Colony, Plantation, or Place (which Courts of Admiralty or Vice Admiralty are hereby respectively authorized and required to proceed, hear and determine the same) at the Election of the Informer or Prosecutor. . . .

2. An Act of Parliament, 1664, later put into effect in America as well as in England:[13]

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[11] A. B. Hart and Edward Channing, "The Stamp Act, 1765," American History Leaflets (A. Lovell & Company, New York, 1895, II, No. 21, 31.

[12] A court of admiralty sat without a jury. [Editor's note]

[13] Quoted in O. M. Dickerson, "Writs of Assistance as a Cause of the Revolution," The Era of the American Revolution, ed. by R. B. Morris (Columbia University Press, New York, 1939), 44n.

> [This selection is an excerpt from a law which allowed public officials with writs of assistance the right to intrude on private property in the daytime for the purpose of securing prohibited goods and merchandise and transfering them to the King's storehouse.]

3. Concerning trials of persons in Massachusetts, the Administration of Justice Act of 1774 states that:[14]

> [This is an excerpt from a law which allows the governor of Massachusetts, "with the advice and consent of the council," to change the place of a trial to another colony or to Great Britain if he is convinced that a trial in Massachusetts will not be objective.]

4. The Declaratory Act, March 18, 1766:[15]

> [This act refuted the right of the legislatures of the colonies to impose taxes and laws which were "derogatory to the legislative authority of parliament, and inconsistent with the dependency of the said colonies and plantations upon the crown of Great Britain" and asserted the authority of Parliament to make laws which were binding on the colonies of America.]

5. Colonial reaction to Parliament's new taxation and enforcement policies was swift and vigorous. From the Resolutions of the Stamp Act Congress, October 19, 1765:[16]

> [These resolutions are what the Stamp Act Congress deem to be the rights, liberties and grievances of the colonists. These include the right: to the same privileges as natural born subjects of Great Britain, to trial by jury, and to petition the King or Parliament. The Congress also protests against the stamp duties.]

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[14] Henry Steele Commager, ed., *Documents of American History*, 6th ed. (Appleton, Century, Crofts, New York, 1958), I, 64.

[15] *Ibid.*, 60-61.

[16] *Ibid.*, 58.

6. John Adams, in the Instructions of the Town of Braintree, Massachusetts, on the Stamp Act, October 14, 1765:[17]

> . . . But the most grievous innovation of all, is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge, whose commission is only during pleasure, and with whom, as we are told, the most mischievous of all customs has become established, that of taking commissions on all condemnations; so that he is under a pecuniary temptation always against the subject. . . . We have all along thought the acts of trade in this respect a grievance; but the Stamp Act has opened a vast number of sources of new crimes, which may be committed by any man, and cannot but be committed by multitudes, and prodigious penalties are annexed, and all these are to be tried by such a judge of such a court! . . . We cannot help asserting, therefore, that this part of the act will make an essential change in the constitution of juries, and it is directly repugnant to the Great Charter itself; for, by that charter, . . . "no freeman shall be taken, or imprisoned, or disseized of his freehold, or liberties of free customs, nor passed upon, nor condemned, but by lawful judgment of his peers, or by the law of the land." . . .

7. Speech by James Otis on the Writs of Assistance, February 24, 1761:[18]

> 2. . . . In the first place, may it please your Honors, I will admit that writs of one kind may be legal: that is, special writs, directed to special officers, and to search certain houses, &c. specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search. . . . And in this light the writ appears like a warrant from a Justice of the Peace to search for stolen goods. Your Honors will find in the old books concerning the office of a Justice of the Peace, precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and such houses specially named, in which the complainant has before sworn that he suspects his goods are concealed; and you will find it adjudged that special warrants only are legal. In the same manner I rely on it, that the writ prayed for in this petition, being general, is illegal. It is a power, that places the liberty of every man in the hands of every petty officer. . . . In the first place, the writ is universal, being directed "to all and singular Justices, Sheriffs, Constables, and other officers and subjects;" so, that, in short, it is

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[17] Charles Francis Adams, ed., The Works of John Adams (Little, Brown, and Company, Boston, 1865), III, 466-67.

[18] *Ibid.*, II, 524-25.

directed to every subject in the King's dominions. Every one with this writ may be a tyrant. . . . In the next place, it is perpetual; there is no return. A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him. In the third place, a person with this writ, in the daytime, may enter all houses, shops, &c. at will, and command all to assist him. . . . Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses, when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way; and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient. . . . I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware; so that these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated. . . . But to show another absurdity in this writ; if it should be established, I insist upon it, every person by the 14 Charles II. has this power as well as custom-house officers. The words are, "It shall be lawful for any person or persons authorized," &c. What a scene does this open! Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.

Again, these writs are not returned. Writs in their nature are temporary things. When the purposes for which they are issued are answered, they exist no more; but these live forever; no one can be called to account. Thus reason and the constitution are both against this writ. Let us see what authority there is for it. Not more than one instance can be found of it in all our law-books; and that was in the zenith of arbitrary power, namely in the reign of Charles II, when star-chamber powers were pushed to extremity by some ignorant clerk of the exchequer. . . . No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void. But these prove no more than what I before observed, that special writs may be granted on oath and probate suspicion. The act of 7 & 8 William III. that the officers of the plantation shall have the same powers, &c., is confined to this sense; that an officer should show probable ground; should take his oath of it; should do this before a magistrate; and that such magistrate, if he thinks proper, should issue a special warrant to a constable to search the places. . . .

8. Letter from the Massachusetts General Court to the Earl of Shelburne, January 15, 1768:[19]

> [This letter asserts the supremacy of the "fundamental rules of the constitution" over the legislature and executive of Britain, and refutes the right of the legislature to "leap the bounds" of the constitution of Britain in exercising power over the American people.]

9. From the Declaration of Independence, July 4, 1776:

. . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.--Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. . . .

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States: . . .

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[19] Documents of American History, 65.

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences: . . .

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People. . . .

10. Thomas Paine, in Rights of Man, 1791-92:[20]

The independence of America, considered merely as a separation from England, would have been a matter but of little importance, had it not been accompanied by a revolution in the principles and practices of governments. . . .

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[20] The Writings of Thomas Paine, II, 401.

SECTION III

INDIVIDUAL RIGHTS IN THE NEW GOVERNMENT

Following the Revolution Americans had to get down to the job of governing themselves, not only as separate colonies or states, but also as a nation. After a brief, weak attempt to establish a viable common government under the Articles of Confederation, leaders of the several states met in Philadelphia in the summer of 1787 to revise the Articles. The result was the drafting of a new Constitution.

After the Constitution was finished, it was sent to the thirteen states to be ratified, where extensive debate took place over the merits of the proposed form of government. Much of the debate concerned the fact that the suggested Constitution contained no bill of rights, outlining the liberties of the people.

The readings in the first part of this section are examples of the reasoning for and against a bill of rights. Keep in mind, as you read the selections, that arguments over individual rights were largely responsible for American independence in the first place, but remember also that even after the Revolution the thirteen states did not agree in their various constitutions as to what rights ought to be guaranteed.

The result of the debate was that the first ten amendments were adopted shortly after the ratification of the Constitution. But the debate reveals more than can be comprehended by a simple reading of the Bill of Rights; it helps us to see just what it was that the Founding Fathers intended the Bill of Rights to do. Two very important questions weave in and out of the selections: 1) the question of the relationship of people to government and 2) the relationship of the new federal government to the government of the states. Both will continue to be extremely significant throughout the history of the United States.

A. The Debate Over a Bill of Rights

1. Letter of Thomas Jefferson to James Madison, December 20, 1787:[1]

> /Jefferson explains that he does not like the Constitution because of its lack of a bill of rights, which he feels "all people are entitled to against every government."/

2. From Richard Henry Lee's Letters from the Federal Farmer to the Republican, October 12, 1787:[2]

> . . . Third, there appears to me to be not only a premature deposit of some important powers in the general government--but many of those deposited there are undefined, and may be used to good or bad purposes as honest or designing men shall prevail. . . .
>
> 4th. There are certain rights which we have always held sacred in the United States, and recognized in all our constitutions, and which, by the adoption of the new constitution in its present form, will be left unsecured. By article 6, the proposed constitution, and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.
>
> It is to be observed that when the people shall adopt the proposed constitution it will be their last and supreme act; it will be adopted not by the people of New Hampshire, Massachusetts, &c., but by the people of the United States; and wherever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away: And not only this, but

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[1] Julian P. Boyd, ed., The Papers of Thomas Jefferson (Princeton University Press, Princeton, N. J., 1955), XII, 440, 442.

[2] Paul L. Ford, ed., Pamphlets on the Constitution of the United States (Brooklyn, New York, 1888), 310-318.

the laws of the United States which shall be made in pursuance of the federal[3] constitution will be also supreme laws, and wherever they shall be incompatible with those customs, rights, laws or constitutions heretofore established, they will also entirely abolish them and do them away. . . .

The federal constitution, the laws of congress made in pursuance of the constitution, and all treaties must have full force and effect in all parts of the United States; and all other laws, rights and constitutions which stand in their way must yield: It is proper the national laws should be supreme, and superior to state or district laws; but then the national laws ought to yield to unalienable or fundamental rights--and national laws, made by a few men, should extend only to a few national objects. This will not be the case with the laws of congress: To have any proper idea of their extent, we must carefully examine the legislative, executive and judicial powers proposed to be lodged in the general government, and consider them in connection with a general clause in art. I, sect. 8 in these words (after enumerating a number of powers) "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."--The powers of this government as has been observed, extend to internal as well as external objects, and to those objects to which all others are subordinate; it is almost impossible to have a just conception of their powers, or of the extent and number of the laws which may be deemed necessary and proper to carry them into effect, till we shall come to exercise those powers and make the laws. In making laws to carry those powers into effect, it is to be expected, that a wise and prudent congress will pay respect to the opinions of a free people, and bottom their laws on those principles which have been considered as essential and fundamental in the British, and in our government: But a congress of a different character will not be bound by the constitution to pay respect to those principles.

It is said that when people make a constitution, and delegate powers, that all powers are not delegated by them to those who govern, is reserved in the people; and that the people, in the present case, have reserved in themselves, and in their state governments, every right and power not expressly given by the federal constitution to those who shall administer the national government. It is said, on the other hand, that the people, when they make a constitution, yield all power not expressly reserved to themselves. The truth is, in either case, it is mere matter of opinion, and men usually take either side of the argument, as will best answer their purposes: But the general presumption being, that men who govern, will in doubtful cases, construe laws and constitutions most favourably for increasing their own powers; all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers reserved. By the state constitutions, certain rights have been reserved in the people; or rather, they have been recognized and established in such a manner, that state legislatures are bound to respect them, and to make no laws infringing upon them. The state legislatures are obliged to take notice of the bills of rights of their respective states. The bills of rights, and the state constitutions, are fundamental compacts only between those who govern, and the people of the same state. . . .

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[3] The word "federal" had two different meanings at the time of the adoption of the Constitution. Lee is using it here to refer to the new national government. But you will also see it used to indicate a government which is not truly national, but federal in the sense that it is a loose confederation of sovereign states. It will be important, if you are to understand the following arguments, that you keep this ambiguity in mind. [Editor's note]

3. Alexander Hamilton in The Federalist, No. 84, 1788:[4]

In the course of the foregoing review of the constitution, I have endeavoured to answer most of the objections which have appeared against it. There remain, however, a few which either did not fall naturally under any particular head, or were forgotten in their proper places. These shall now be discussed: but as the subject has been drawn into great length, I shall so far consult brevity, as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of the remaining objections is, that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked, that the constitutions of several of the states are in a similar predicament. I add, that New York is of the number. And yet the persons who in this state oppose the new system, while they profess an unlimited admiration for our particular constitution, are among the most intemperate partizans of a bill of rights. To justify their zeal in this matter, they allege two things: one is, that though the constitution of New York has no bill of rights prefixed to it, yet it contains, in the body of it, various provisions in favour of particular privileges and rights, which, in substance, amount to the same thing; the other is, that the constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights, not expressed, are equally secured.

To the first I answer, that the constitution offered by the convention contains, as well as the constitution of this state, a number of such provisions. . . .

/Some of these provisions are that/ . . . "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." . . . "No bill of attainder or ex post facto law shall be passed." "No title of nobility shall be granted by the United States: . . . "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed." . . .

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[4] John C. Hamilton, ed., The Federalist (J. B. Lippincott & Co., Philadelphia, 1882), 627-33. (Footnotes omitted)

It may well be a question, whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this state. . . .

[A] minute detail of particular rights, is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns. If therefore the loud clamours against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this state. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further, and affirm, that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a right to prescribe proper regulations concerning it, was intended to be bested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights. . . .

There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights, in Great Britain, form its constitution, and conversely the constitution of each state is its bill of rights. In like manner the proposed constitution, if adopted, will be the bill of rights of the union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the

> plan of the convention; comprehending various precautions for the public security, which are not to be found in any of the state constituitons. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are provided for in any part of the instrument which establishes the government. Whence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions, entirely foreign to the substance of the thing.

B. Barron v. Baltimore: Double Standard Adjudicated

It was not long after the Bill of Rights was appended to the Constitution that someone raised the question as to the extent of its prohibitions. The city of Baltimore made some street repairs and, in doing so, caused sand and gravel to be deposited in the water near Barron's wharf, rendering it virtually useless. Barron contended that this action deprived him of his property without just compensation and that, therefore, the city of Baltimore had acted illegally since it was contrary to the Fifth Amendment. In 1833 Barron's case reached the Supreme Court.

1. Chief Justice Marshall delivered the Court's opinion:[5]

> . . . The question thus presented is, we think, of great importance, but not of much difficulty.
>
> The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations

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[5] Barron v. Baltimore, 7 Peters 243, 247-48, 250-51 (1833).

and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. . . .

If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. . . .

Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. . . .

SECTION IV

FEDERALISM RECONSIDERED? THE FOURTEENTH AMENDMENT

After the Civil War the United States had to face the problem of what to do about the power of the states over matters of individual rights. The Fourteenth Amendment was the most important attempt at a solution. The first part of this section consists of readings regarding the purpose of the amendment, the second part deals with the Supreme Court's interpretation of the amendment shortly after it was adopted. In reading both parts, it will help if you will keep in mind not only what the first section of the amendment says but also its intention.

A. The Purpose of the Amendment

1. From the Civil Rights Act, April 9, 1866:[1]

> /This act ensures that Negro Americans, "excluding Indians not taxed," are citizens and are to be treated the same under the law as white Americans, "without regard to any previous condition of slavery or involuntary servitude."/

2. The first and fifth sections of the Fourteenth Amendment, ratified in 1868:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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[1] Documents of American History, II, 14.

3. Some Congresmen thought that the civil rights of Negroes could be protected by Congressional legislation; others felt that a simple Act of Congress would not be sufficient to the task or that such an act would even be unconstitutional. John A. Bingham, one of the authors of the Fourteenth Amendment, discussed its purpose in Congress on February 2, 1866:[2]

> . . . /The statement that "all persons are entitled to life, liberty, and the pursuit of happiness"/ rests upon the authority of the whole people of the United States, speaking through their Constitution as it has come to us from the hands of the men who framed it. The words of that great instrument are:
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> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."
>
> "No person shall be deprived of life, liberty, or property, without due process of law."
>
> What do gentlemen say to these provisions? "Oh, we favor that; we agree with the President that the basis of the American system is the right of every man to life, liberty, and the pursuit of happiness; we agree that the Constitution declares the right of every citizen of the United States of the enjoyment of all privileges and immunities of citizens in the several States, and of all persons to be protected in life, liberty, and property."
>
> Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States?

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[2] Congressional Globe, 39th Cong., 1st Sess., 1089-1090.

What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States. . . .

The gentleman seemed to think that all persons could have remedies for all violations of their rights of "life, liberty, and property" in the Federal courts.

I ventured to ask him yesterday when any action of that sort was ever maintained in any of the Federal courts of the United States to redress the great wrong which has been practiced, and which is being practiced now in more States than one of the Union under the authority of State laws, denying to citizens therein equal protection or any protection in the rights of life, liberty, and property. . . .

A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.

Mr. Speaker, on this subject I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters, 247, in the case of Barron vs. The Mayor and City Council of Baltimore, involving the question whether the provisions of the fifth article of the amendments to the Constitution are binding upon the State of Maryland and to be enforced in the Federal courts. . . .

The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this amendment, if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men. Why should it not be so? That is the question. Why should it not be so? Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced. . . .

I commend . . . to the honorable gentleman from New York [Mr. Hale] the paper issued by his distinguished fellow-citizen, when he was acting as Secretary of State for the United States, the lamented Marcy, touching the protection of the rights of Martin Koszta, a citizen of the United States, whose rights were invaded abroad, within the jurisdiction of the empire of Austria. Commodore Ingraham gave notice that he would fire upon their town and their shipping unless they respected the rights of a declared citizen of the American Republic. You had the power to enforce your demand. But you are powerless in time of peace, in the presence of the laws of South Carolina, Alabama, and Mississippi, as States admitted and restored to the Union, to enforce the rights of citizens of the United States within their limits.

Do gentlemen entertain for a moment the thought that the enforcement of these provisions of the Constitution was not to be considered essential? Consider the triple safeguards interposed in the Constitution itself against their denial. It is provided in the Constitution, in the first place, that "this Constitution," the whole of it, not a part of it, "shall be the supreme law of the land." Supreme from the Penobscot in the farthest east, to the remotest west where rolls the Oregon; supreme over every hamlet, every State, and every Territory of the Union.

As the whole Constitution was to be the supreme law in every State, it therefore results that the citizens of each State, being citizens of the United States, should be entitled to all the privileges and immunities of citizens of the United States in every State, and all persons, now that slavery has forever perished, should be entitled to equal protection in the rights of life, liberty, and property. . . .

"Let it be remembered that the rights for which America has contended were the rights of human nature. . . .

As slaves were not protected by the Constitution, there might be some color of excuse for the slave States in their disregard for the requirement of the bill of rights as to slaves and refusing them protection in life or property; though, in my judgment, there could be no possible apology for reducing men made like themselves, in the image of God, to a level with the brutes of the field, and condemning them to toil without reward, to live without knowledge, and die without hope.

But, sir, there never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights. . . .

4. A recent historian comments on the Fourteenth Amendment:[3]

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[3] John P. Roche, Courts and Rights (Random House, New York, 1961), 64-65. (Footnotes omitted)

> /John Roche argues that the Fourteenth Amendment initiated the necessary protection of the "natural" and civil rights of Negroes and whites. The contemporary criticisms of the radical Republicans' motives and program overlook the fact that the war for states' sovereignty over human rights had been lost. Roche justifies the radicals' "technique," which was to ensure that human rights would be "put under the protection of the national government."/

5. It might be instructive if three documents already studied are compared carefully:

> . . . No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. . . . /Magna Carta/

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . /Fifth Amendment/

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .
> /Fourteenth Amendment/

B. Emasculation of the Amendment

1. In 1873 the Supreme Court decided a case which was to have enormous impact on the history of individual rights in the United States. The reconstruction government of Louisiana had granted one company an exclusive license to operate slaughterhouses in the New Orleans area. As a consequence, hundreds of other slaughterhouse operators were deprived of their livelihood. These operators took their case to the courts, arguing that Louisiana was depriving them of their liberties and property without due process of law, which was prohibited by the Fourteenth Amendment. This is a very difficult case to read, but it is a very important one in the history of the Fourteenth Amendment and individual liberties. Thus, careful study of the logic involved is in order. Part of the Court's reasoning follows:[4]

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[4] Slaughterhouse Cases, 16 Wallace 36, 66-67, 72-75, 77-78 (1873). Italics are the editors.

. . . The plaintiffs in error accepting this issue, allege that the /Louisiana/ statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the Thirteenth article of Amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the Fourteenth argicle of Amendment.

This Court is thus called upon for the first time to give construction to these articles. . . .

The first section of the Fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship--not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this Court, in the celebrated Dred Scott case, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. . . .

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section . . . speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to a citizen of the state as such, the latter must rest for their security and protection where they have hereto fore rested; for they are not embraced by this paragraph of the amendment. . . .

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states--such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states? . . .

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them. . . .

2. Then, in 1900, Justice Peckham wrote for the Court:[5]

. . . It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the States. In order to limit the powers which it was feared might be claimed or exercised by the Federal Government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several States by the first Congress on the 25th of September 1789. They were intended as restraints and limitations upon the powers of the General Government, and were not intended to and did not have any effect upon the powers of the respective States. This has been many times decided. . . .

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States and therefore, the States cannot provide for any procedure in state courts which could not be followed in a Federal court because of the limitations contained in those amendments. . . .

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[5] Maxwell v. Dow, 176 U. S., 581, 586-87, 592-93 (1900).

That the primary reason for that amendment [Fourteenth] was to secure the full enjoyment of liberty to the colored race is not denied, yet it is not restricted to that purpose, and it applies to every one, white or black, that comes within its provisions. But, as said in the *Slaughter-house cases*, the protection of the citizen in his rights as a citizen of the State still remains with the State. . . . [S] overeignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States. . . .

SECTION V

THE SUPREME COURT AND INDIVIDUAL RIGHTS SINCE THE TWENTIES

The Slaughterhouse Cases and Maxwell v. Dow, along with a number of other cases, were decided almost as if the Civil War had not been fought. According to the interpretation which these cases gave of the due process clause of the Fourteenth Amendment, the civil rights of Negroes and those of everyone else as well were still to be decided by the various states, four years of ruinous war to the contrary notwithstanding.

Despite the Civil War, relatively few people concerned themselves with the rights of Negroes in the United States until the 1950's. But even though the war had been fought largely over the slavery issue, the Fourteenth Amendment applied not just to Negroes but to all persons. By the mid-twenties people began to contend that civil rights, chiefly freedom of speech and press, were being denied them by various states. Some of these people brought cases to the Supreme Court, and the Court began putting some teeth back into the amendment. In some of its decisions the Court began to prohibit the states from taking action which was contrary to some particular provisions of the Bill of Rights.

The readings in this section are pertinent to some of the rights which the Court has considered since 1925, but by no means do they represent a complete history of the Court's decisions on individual rights in this period. They do, however, represent the Court's recent positions on a few of those rights which we have already considered in this unit.

The selections in Part A are recent opinions of either the Court or of individual Justices regarding some of the rights which have been at issue in America since the days of the Revolution, while those in Part B provide some assessment of the state of these liberties in the twentieth century.

A. Reconsideration of Trial by Jury, "Writs of Assistance," and the Right to Counsel

1. In 1937, Justice Cardozo, delivering the opinion of the Court in Palko v. Connecticut, explained why the Fourteenth Amendment does not apply the entire Bill of Rights to the states, limiting the action of the states to the same extent that the federal government is limited. Palko had been convicted of second degree murder and sentenced to life imprisonment. Since there had been an error in his trial, to the prejudice of the state's case, the state appealed the case to a higher state court. The higher court granted a new trial, and this time Palko was convicted of first degree murder and sentenced to death. Palko then appealed to the United States Supreme Court, claiming that such a procedure put him in double jeopardy. His argument was that the Fourteenth Amendment extended the Fifth Amendment's immunity from double jeopardy to state courts. The Supreme Court's answer follows. This case is not just a rehash of the Slaughterhouse Cases and Maxwell v. Dow; Justice Cardozo is considering a question here which was not raised in the earlier cases.[1]

> The argument for appellant [Palko] is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth

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[1] 302 U. S., 319, 322-326 (1937).

Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the people of a state. . . .

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original Bill of Rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This Court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. . . . The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This Court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. . . . The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This Court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. . . .

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress /according to earlier Supreme Court decisions/ . . . or the like freedom of the press . . , or the free exercise of religion . . , or the right of peaceable assembly, without which speech would be unduly trammeled. . . . In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of

> ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. . . . This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. . . . The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

2. In Adamson v. California, 1947, the Supreme Court again refused to apply the Fifth Amendment to the states. Adamson had been convicted of murder in California. When he refused to testify and explain his previous record, pursuant to the California constitution his refusal was considered by the jury as part of the case. Adamson claimed that such a procedure had the effect of requiring one to testify against himself. The Supreme Court decided that the California procedure was allowable under the Constitution. Justice Black dissented, however, and in doing so he explained why he believes the entire Bill of Rights should apply to the states as well as to the federal government.[2]

> This decision reasserts a constitutional theory spelled out in Twining v. New Jersey, . . . that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice" . . .
>
> The Twining Case was the first, as it is the only, decision of this Court which has squarely held that states were free, notwithstanding the Fifth and Fourteenth Amendments, to extort evidence from one accused of crime. I agree that if Twining be reaffirmed, the result reached might

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[2] U. S., 46, 69-72, 74, 89-92 (1947). (Footnotes omitted)

appropriately follow. But I would not reaffirm the Twining Decision. I think that decision and the "natural law" theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise. Furthermore, the Twining Decision rested on previous cases and broad hypotheses which have been undercut by intervening decisions of this Court. My reasons for believing that the Twining Decision should not be revitalized can best be understood by reference to the constitutional, judicial, and general history that preceded and followed the case. That reference must be abbreviated far more than is justified but for the necessary limitations of opinion-writing.

The First Ten Amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments--Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases. Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

But these limitations were not expressly imposed upon state court action. In 1833, Barron v. Baltimore was decided by this Court. It specifically held inapplicable to the States that provision of the Fifth Amendment which declares: "nor shall private property be taken for public use, without just compensation." In deciding the particular point raised, the Court there said that it could not hold that the first eight Amendments applied to the States. This was the controlling constitutional rule when the Fourteenth Amendment was proposed in 1866.

My study of the historical events that culminated in the Fourteenth Amendment, and expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the States. With full knowledge of the import of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment. . . .

In the Twining opinion, the Court explicitly declined to give weight to the historical demonstration that the first section of the Amendment was intended to apply to the States the several protections of the Bill of Rights. It held that that question was "no longer open" because of previous decisions of this Court which, however, had not appraised the historical evidence on that subject. The Court admitted that its action had resulted in giving "much less effect to the Fourteenth Amendment than some of the public men active in framing it" had intended it to have. . . .

I cannot consider the Bill of Rights to be an outworn Eighteenth Century "strait jacket" as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century whereever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced, and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the Palko Decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment--to extend to all the people of the Nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution. . . .

Since Marbury v. Madison was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."

3. Justice Murphy writes about trial by jury in 1942:[3]

Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression, but, while proclaiming trial by jury as 'the glory of the English law,' Blackstone was careful to note that it was but a 'privilege.' Our Constitution transforms that privilege into a right in criminal proceedings in a federal court.

4. Justice Peckham, writing for a majority of the Court, February 26, 1900:[4]

In Walker v. Sauvinet, . . . it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the Fourteenth Amendment. The action was tried without a jury by virtue of an act of the legislature of the State of Louisiana. The plaintiff in error objected to such a trial, alleging that he had a constitutional right to a trial by jury, and that the statute was void to the extent that it deprived him of that right. The objection was overruled. Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"By article 7 of the amendments it is provided that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. . . . The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. . . . Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. . . .

This case shows that the Fourteenth Amendment is forbidding a State to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the Federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment. . . .

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[3] Glasser v. United States, 315 U. S. 84 (1942). (Footnotes omitted)

[4] Maxwell v. Dow, 176 U. S. 581, 594-96. (Footnotes omitted)

5. Justice Lurton, delivering the opinion of the Court in Jordan v. Massachusetts, May 27, 1912:[5]

> In criminal cases due process of law is not denied by a state law which dispenses . . . with the necessity of a jury of twelve, or unanimity in the verdict. Indeed, the requirement of due process does not deprive a state of the power to dispense with jury trial altogether. . . .

6. Justice Cardozo, delivering the opinion of the Court in Snyder v. Massachusetts, 1934:[6]

> . . . [A state] is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. . . .

7. In 1914 The Supreme Court decided, in Weeks v. United States, that evidence obtained by federal officers in an unreasonable or illegal search must be excluded from criminal trials in federal courts. The issue was the old one of writs of assistance. In Wolf v. Colorado (1949), the Court decided that the "exclusionary rule" of the Weeks case did not apply to the state courts and that each state could make its own rules concerning the admissibility of such evidence in its own courts. Later, in 1961, Justice Douglas, concurring with the majority opinion in Mapp v. Ohio, also discusses the subject of the use of evidence acquired without a warrant:[7]

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[5] 32 S. Ct. 652.

[6] 54 S. Ct. 332. (Footnotes omitted)

[7] 367 U. S. 643, 666-672 (1961). (Footnotes omitted)

Though I have joined the opinion of the Court, I add a few words. This criminal proceeding started with a lawless search and seizure. The police entered a home forcefully, and seized documents that were later used to convict the occupant of a crime.

She lived alone with her fifteen-year-old daughter in the second-floor flat of a duplex in Cleveland. At about 1:30 in the afternoon of May 23, 1957, three policemen arrived at this house. They rang the bell, and the appellant, appearing at her window, asked them what they wanted. According to their later testimony, the policemen had come to the house on information from "a confidential source that there was a person hiding out in the home, who was wanted for questioning in connection with a recent bombing." To the appellant's question, however, they replied only that they wanted to question her and would not state the subject about which they wanted to talk.

The appellant, who had retained an attorney in connection with a pending civil matter, told the police she would call him to ask if she should let them in. On her attorney's advice, she told them she would let them in only when they produced a valid search warrant. For the next two and a half hours, the police laid siege to the house. At four o'clock, their number was increased to at least seven. Appellant's lawyer appeared on the scene; and one of the policemen told him that they now had a search warrant, but the officer refused to show it. Instead, going to the back door, the officer first tried to kick it in and, when that proved unsuccessful, he broke the glass in the door and opened it from the inside.

The appellant, who was on the steps going up to her flat, demanded to see the search warrant; but the officer refused to let her see it although he waved a paper in front of her face. She grabbed it and thrust it down the front of her dress. The policemen seized her, took the paper from her, and had her handcuffed to another officer. She was taken upstairs, thus bound, and into the larger of the two bedrooms in the apartment; there she was forced to sit on the bed. Meanwhile, the officers entered the house and made a complete search of the four rooms of her flat and the basement of the house.

The testimony concerning the search is largely nonconflicting. The approach of the officers; their long wait outside the home, watching all its doors; the arrival of reinforcements armed with a paper; breaking into the house; putting their hands on appellant and handcuffing her; numerous officers ransacking through every room and piece of furniture, while the appellant sat, a prisoner in her own bedroom. There is direct conflict in the testimony, however, as to where the evidence which is the basis of this case, was found. To understand the meaning of that conflict, one must understand that this case is based on the knowing possession of four little pamphlets, a couple of photographs and a little pencil doodle--all of which are alleged to be pornographic.

According to the police officers who participated in the search, these articles were found, some in appellant's dressers and some in a suitcase found by her bed. According to appellant, most of the articles were found in a cardboard box in the basement; one in the suitcase beside her bed. All of this material, appellant--and a friend of hers--said were odds and ends belonging to a recent boarder, a man who left suddenly for New York and had been detained there. As the Supreme Court of Ohio read the statute under which appellant is charged, she is guilty of the crime whichever story is true.

The Ohio Supreme Court sustained the conviction even though it was based on the documents obtained in the lawless search. For in Ohio evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution at least where it was not taken from the "defendant's person by the use of brutal or offensive force against defendant." . . . This evidence would have been inadmissible in a federal prosecution. . . . For, as stated in the /Weeks/ . . . decision, "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints. . . ." It was therefore held that evidence obtained (which in that case was documents and correspondence) from a home without any warrant was not admissible in a federal prosecution.

We held in Wolf v. Colorado, . . . that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the Weeks case /that illegally obtained evidence is not admissable in federal courts/ was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle.

As stated in the Weeks case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures is of no value and . . . might as well be stricken from the Constitution." . . .

We allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home (to use an expression of Mr. Justice Murphy, Wolf v. Colorado, at 46), we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the policy system, including prosecution of the police officer for a crime. Yet as Mr. Justice Murphy said in Wolf v. Colorado, at 42, "Self-scrutiny is a lofty ideal, but its exaltion reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. . . . The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, Wolf v. Colorado in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter," as Mr. Justice Rutledge said in his dissent. . . .

Wolf v. Colorado, supra, was decided in 1949. The immediate result was a storm of constitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which Wolf imported into the law. . . . It is an appropriate case because the facts it presents show--as would few other cases--the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person. . . .

Moreover, continuance of Wolf v. Colorado in its full vigor breeds the unseemly shopping around of the kind revealed in Wilson v. Schnettler. . . . Once evidence, inadmissible in a federal court, is admissible in a state court a "double standard" exists which, as the Court points out, leads to "working arrangements" that undercut federal policy and reduce some aspects of law enforcement to shabby business. The rule that supports that practice does not have the force of reason behind it.

8. Justice Black, who had dissented in Betts v. Brady in 1942, delivers the unanimous opinion of the Court in Gideon v. Wainwright in 1963:[8]

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

> "The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.
>
> "The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when Betts v. Brady, . . . was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. . . .

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[8] 372 U. S. 335, 336-40, 343-45 (1963). (Footnotes omitted)

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. . . . the Court held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." . . . On the basis of . . . historical data the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." . . . The fact is that in deciding as it did--that "appointment of counsel is not a fundamental right, essential to a fair trial"--the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an

> orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. . . .
>
> Twenty-two States, as friends of the Court, argue that Betts was "an anachronism when handed down" and that it should now be overruled. We agree.
>
> The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.
>
> Reversed.

9. Danny Escobedo was arrested on suspicion of murdering his brother-in-law in 1960. He was taken to the police station. Despite his request, he was not allowed to see a lawyer until after the police had finished their interrogation, nor was he advised by the police of his right to see a lawyer and of his right not to speak. During the interrogation, Escobedo made a damaging admission, indicating complicity in the crime. On the basis of this admission, he was convicted. Escobedo appealed to the Supreme Court, and Justice Goldberg delivered the opinion of the Court in his case:[9]

> The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's [Escobedo] request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," Gideon v. Wainwright, . . . and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation. . . .

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[9] Escobedo v. Illinois, 378 U. S. 478, 486-91 (1964). Footnotes omitted.)

Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of "mere" complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots. . . . The "guiding hand of counsel" was essential to advise petitioner of his rights in this delicate situation. . . . This was the "state when legal aid and advice" were most critical to petitioner. . . . What happened at this interrogation could certainly "affect the whole trial," . . . since rights "may be as irretrievable lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." . . . It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder. . . .

/A state/ court observed that it "would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police." . . .

In Gideon v. Wainwright, . . . we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial /would be/ a very hollow thing /if/, for all practical purposes, the conviction is already assured by pretrial examination." . . . "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'" . . .

It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be adivsed by his lawyer of his privilege against self-incrimination.

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . . .

> This Court . . . has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence. . . ."
>
> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to _fear_ that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.
>
> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment, "_Gideon_ v. _Wainwright_, . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

B. Thoughts and Afterthoughts

1. New York Police Commissioner Grover A. Whalen, explaining his instructions to his men upon taking office in 1928:[10]

> "I told them," said Commissioner Whalen, "that there is a lot of law in a nightstick. . . ."

2. From a recent assessment of Supreme Court decisions on the rights of the accused:[11]

> [In this article Daniel Gutman cites two cases, _Mapp_ and _Massiah_, to indicate that "the Supreme Court may have gone beyond the requirements of the constitutional mandate" and made it more difficult to convict guilty felons by insisting on certain procedural rules which previously were not demanded _in_ lower courts or in previous Supreme Court decisions._]_

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[10] _New York Times_, December 20, 1928, 2.

[11] Daniel Gutman, "The Criminal Gets the Breaks," The _New York Times Magazine_ (November 29, 1964), 36, 120, 121.

3. From an article in Time entitled "Criminal Justice: After Escobedo:"[12]

> /This article indicates that the decision in the Escobedo case has caused the right to counsel to be greatly extended since suspects "are now entitled to the physical presence of a lawyer as soon as 'the process shifts from investigatory to accusatory.'" The impact of the decision on lower courts is indicated in one traffic violation case in which the accused man was released because the police officer did not tell him that he did not have to answer his questions and "could consult a lawyer." The judge cited the Escobedo case as the basis of his decision./

4. Justice White, in a dissenting opinion in Escobedo v. Illinois:[13]

The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become a suspect. From that very moment apparently his right to counsel attaches, a rule wholly unworkable and impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side. . . .

5. An article entitled "Why Policeman's Job is Getting Tougher" from U. S. News and World Report:[14]

> /This article notes that the trend of the courts is to restrict the investigatory activities of the police, such as "search and seizure" without a warrant, to such an extent that criminals are able to act more freely. This has caused "police to ask: Is the public more concerned about the protection of defendants than about the prevention of crime and the enforcement of law?"/

6. A former Attorney General of Great Britain comments on the rights of the accused under Anglo-Saxon systems of law:[15]

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[12] Time: The Weekly Newsmagazine, February 12, 1965, 74-75. (Footnote omitted) (Courtesy Time: Copyright Time, Inc., 1965)

[13] 378 U. S. 478, 496.

[14] U. S. News & World Report, July 26, 1957, 38-40.

[15] Lord Shawcross, "Crime Does Pay Because We Do Not Back Up The Police," The New York Times Magazine (June 13, 1965), 44-50.

> [In this article Lord Shawcross argues that most criminals are not caught because the law has become more unrealistic in dealing with an increasingly large *and* efficient group of criminals. He feels that "[W]e put illusory fears about the impairment of liberty before the promotion of justice" and contends that the laws favor the activities of criminals that are greater threats to "our privacy and our liberties" than are those of the police.]

7. From an editorial in *Life*, May 21, 1965:[16]

> [The contention in this editorial is that, although procedural protection is important, in some of those cases in which the Supreme Court excluded evidence, justice and perhaps societal and individual rights to be protected from crime were subordinated to "procedural elegance."]

8. The Chief Justices of ten states criticize Supreme Court decisions on some points of criminal law:[17]

> [This selection states the view that there are no great conflicts between the Supreme Court and the state courts of criminal justice on doctrinal bases. Differences develop when the general principles are applied and when there is a consideration as to whether they have been "duly regarded," *Moore* v. *Michigan* is cited as an example of the Supreme Court reversing the decision of the lower courts in a case where a lawyer was not obtained to help defend a youth who had refused counsel.]

9. Justice Frankfurter, writing in 1930:[18]

> [Frankfurter argues that the Bill of Rights is wise and necessary and traces its roots to English law. Without a bill of rights, Frankfurter contends, public officials justify brutality and passion as being necessary for the public weal, as was the case in the

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[16] "The Courts vs. The Police," *Life*, May 21, 1965, 4.

[17] From *The Conference of Chief Justices: Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions*, August, 1958. Quoted in John P. Roche and Leonard W. Levy, eds., *The Judiciary* (Harcourt, Brace, & World, Inc., New York, 1964), 190-191.

[18] Felix Frankfurter, *The Public and Its Government*, 57-61. (Footnotes omitted)

seventeenth and eighteenth centuries. Although he expresses awareness of the weaknesses of the jury system, he argues that crime will not be reduced "by departing from the procedural wisdom of the Bill of Rights."]

10. A recent writer discusses the law and civil liberties:[19]

> [In this article Alan Barth expresses concern about police methods which in his view "breach the law and encroach seriously on rights of privacy." He cites the misuse of vagrancy and disorderly conduct laws, dragnet arrests and arrests without warrants as examples of questionable police practices. In his opinion, recent court decisions concerning the Fourth Amendment have reaffirmed its original intent of protecting privacy. He argues that, although "terror in the streets" is a danger, it cannot be eliminated by vigorous police action alone and could cause panic and the resultant exaltation of "order at the cost of liberty."]

11. A report of Dean Erwin N. Griswold's evaluation of recent Supreme Court decisions appeared in *Time*, May 21, 1965:[20]

> [Griswold supports recent Supreme Court decisions that have, in his view, forced the state courts to abide by the Fourteenth Amendment and "the high standards we have so long professed." He cites several past cases in state courts in which questionable procedural tactics were tolerated. He admits that recent decisions make law enforcement more difficult and contends that more needs to be done "to help and upgrade the police."]

12. "The revolution in Criminal Justice" appeared in *Time*, July 16, 1965:[21]

> [This article is concerned with the controversy over whether the "judicial pendulum" has "swung too far toward protection of the individual criminal, too

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[19] Alan Barth, "Why Handle Criminals with Kid Gloves?" *Harper's Magazine* (September, 1959), 17-18.

[20] *Time; The Weekly Newsmagazine*, May 21, 1965, 63.

[21] *Time: The Weekly Newsmagazine*, July 16, 1965, 22-23.

> far away from protection of society." Noting the disregard of the Bill of Rights in the past and the implications of recent court decisions, the article goes on to describe many of the efforts at judicial reform which have as their goal the protection of the rights of the accused, as well as the protection of the innocent citizen from the criminal./

13. Justice Douglas on procedural rights:[22]

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule of law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law. . . .

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[22] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 179 (1951).

APPENDIX

THE BILL OF RIGHTS

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SUGGESTIONS FOR FURTHER READING

One of the best introductions to the history of individual rights in the United States is John P. Roche's incisive little book, Courts and Rights. Also good as introductions, including valuable historical information as well as interpretation, are Roche's "American Liberty" (in Milton Konvitz and Clinton Rossiter, eds., Aspects of Liberty) and Justice Hugo Black's essay, "The Bill of Rights." The latter has been reprinted in several books, one of which is Edmond Cahn's The Great Rights. Learned Hand's The Bill of Rights and William O. Douglas' The Right of the People are also good general books on the subject.

There are a number of works relevant to individual rights which also provide important historical background. The Federalist Papers are, of course, essential to any complete study of the adoption of the Constitution and the beginnings of American federalism. A. T. Mason's The States Rights Debate contains other significant documents on the framing and adoption of the Constitution.

A perceptive study of the purpose of the Fourteenth Amendment is Howard Jay Graham's "Our 'Declaratory' Fourteenth Amendment" (Stanford Law Review, Vol. VII, 1954).

Gideon's Trumpet, by Anthony Lewis, is an interesting, readable book on the Gideon case and the right to counsel in the United States, and it also furnishes a view of the Supreme Court in action.